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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN BORAX, DECEASED,
HERMINE H. BORAX, ET AL., EXECUTORS

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HAROLD E. WONDSEL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in the above-entitled cases.

OPINIONS BELOW

The opinion of the Tax Court in the *Borax* case (R., Vol. I, pp. 7a–22a) is reported at 40 T.C. 1001. The opinion of the court of appeals (R., Vol. II, pp.

21–41) is reported at 349 F. 2d 666 (Appendix A, *infra,* pp. 19–40).

The opinion of the Tax Court in the *Wondsel* case (R., Vol. I, pp. 1(c)–17) has not been officially reported. The opinion of the court of appeals (R., Vol. II, pp. 26–32) is reported at 350 F. 2d 339 (Appendix B, *infra,* pp. 43–48).

JURISDICTION

The judgments of the court of appeals in the *Borax* case were entered on July 30, 1965 (Appendix A, *infra,* pp. 41–42). By orders of Mr. Justice Harlan the time for filing a petition for a writ of certiorari was extended to and including December 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in the *Wondsel* case was entered on August 2, 1965 (Appendix B, *infra,* p. 49). By orders of Mr. Justice Harlan, the time for filing a petition for a writ of certiorari was extended to and including December 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondents, while living in New York, obtained *ex parte* divorces from their wives (one in Mexico and the other in Florida). The New York Supreme Court, in proceedings subsequently brought by respondents' first wives (in which respondents were personally served), held that the *ex parte* divorces were void; that respondents were still married to their first wives; and that respondents' later marriages

were a nullity. The following questions are presented:

1. Whether, notwithstanding the New York judgments that their divorces and remarriages were void, respondents may treat these events as valid "for tax purposes" and thus (1) file joint federal income tax returns as "husband and wife" (1954 Code § 6013) with the women with whom they are living but to whom they are not for other purposes married, (2) take $600 dependency exemptions for such women as their "spouses" (1954 Code § 151), and (3) take $600 dependency exemptions for such women's relatives on the theory that they are related to the taxpayers by marriage (1954 Code § 152).

2. Whether respondents may treat the invalid divorce decrees as having "divorced [their wives] * * * from [them]" (1954 Code § 71(a)(1)) so that amounts thereafter paid under a previous separation agreement will become deductible (1954 Code § 215).

STATUTES INVOLVED

The relevant portions of the Internal Revenue Code are set forth in Appendix C, *infra*, pp. 51–54.

STATEMENT

1. *The Borax Case.* Herman and Ruth Borax were married in New York City in 1935, and lived there as husband and wife until March, 1946, when they separated by mutual consent. At that time they executed a written separation agreement providing, in part, that Herman would pay Ruth $575 per month (*i.e.*, $6,900 per year) in full satisfaction of any alimony

which might subsequently be awarded by any court. Later that year this amount was raised to $8,550 per year by a consent decree of the New York Supreme Court.

Six years later, in August 1952, Herman Borax procured an *ex parte* divorce in Mexico.

Shortly thereafter, he went through two marriage ceremonies with Hermine, first in Mexico and then in Connecticut. Herman and Hermine then resided together in New York City.

Ruth was neither served nor did she participate in Herman's Mexican divorce. In fact, a few months after the Mexican decree Ruth brought suit in the New York Supreme Court; both Herman and Hermine were personally served and actively participated. In early 1953, that court, which had personal jurisdiction over Ruth, Herman and Hermine (all three of whom were also New York residents), issued an order in which it was adjudged and decreed (1) that Herman's Mexican divorce was "invalid and of no force of effect in law," (2) that Ruth was still Herman's lawful wife, and (3) that Herman and Hermine were not husband and wife.[1]

For the years 1952–1955 and 1957 Herman and Hermine filed joint income tax returns, on which Herman claimed $600 dependency exemptions for Her-

[1] Respondent's divorce would still be invalid under present New York law, since the recent cases of *Rosenstiel* v. *Rosenstiel* and *Wood* v. *Wood*, 16 N.Y. 2d 64, 209 N.E. 2d 709, validated only those Mexican divorces where one spouse was physically present in Mexico and the other appeared by attorney.

mine's parents and her children by a prior marriage, and deducted the amounts paid to Ruth (his first wife) under their 1946 agreement. The Commissioner of Internal Revenue took the position that the New York Supreme Court's decree established that Herman and Hermine were not legally married, and they were thus not eligible to file a joint return as "husband and wife," Int. Rev. Code of 1954, § 6013(a).[2] He also determined that Herman could not take dependency exemptions for Hermine's parents (because they were not his "father-in-law" and "mother-in-law") or for her children by a prior marriage (because they were not his "stepson" or "stepdaughter"). 1954 Code § 152(a)(2), (8).[3] The Commissioner also disallowed Herman's claimed deduction for payments to his first wife, Ruth, under their written agreement, on the ground that since the New York Supreme Court had declared the Mexican divorce null and void the payments were not incident to a judicial decree under which the parties were "divorced or legally separated" as required by the Code.[4]

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[2] See also 1939 Code § 51(b). Some of the years involved are governed by the 1939 Code; except where otherwise stated the relevant provisions of the 1939 and 1954 Codes are substantially the same.

[3] See also 1939 Code § 25(b)(3)(B), (H). If, however, Herman had proved that Hermine's children or parents had lived with him, they would have qualified as his dependents under the 1954 Code (although not under the 1939 Code) regardless of their legal relationship to him. 1954 Code § 152(a)(9); *Estate of Daniel Buckley* v. *Commissioner*, 37 T.C. 664, 673.

[4] 1954 Code §§ 71(a)(1) and 215; 1939 Code §§ 22(k) and 23(u).

The Tax Court sustained the Commissioner's determinations; the Second Circuit reversed (one judge dissenting) on the ground that the Mexican divorce decree should be treated as valid "for tax purposes." (App. A, *infra,* pp. 19–40; R., Vol. I, pp. 7a–22a.)

2. *The Wondsel Case.* Harold and May Wondsel were married in New York in 1927. In 1936, they entered into a written separation agreement requiring Harold to pay May $65 a week. The next year, Harold obtained an *ex parte* divorce from May in Florida; the final decree of divorce also required him to pay her $65 a week. Two years later, in 1939, Harold married Virginia in Connecticut, and they settled in New York. In 1941 (while all three parties were living in New York), May brought suit against Harold and Virginia in the Supreme Court of New York. Both Harold and Virginia were personally served but failed to appear. The court entered a judgment that the *ex parte* Florida divorce was null and void, that May was still Harold's wife, and that Harold's marriage to Virginia was void.

In 1946, Harold and Virginia entered into a separation agreement requiring him to pay her $200 a month. Harold again journeyed to Florida, and this time obtained an *ex parte* divorce from Virginia, in which the separation agreement was approved. Three months later, Harold married Joyce in New Jersey. Finally, in 1961, while Harold and Joyce were living in New York, the New York Supreme Court annulled Joyce's marriage to Harold on the ground that he was still married to May (his first wife).

For the taxable years 1957–1959, Harold filed joint income tax returns with Joyce (his third wife) in which he deducted his alimony payments to both May and Virginia. The Commissioner of Internal Revenue refused to allow Harold to file joint returns as "husband and wife" (1954 Code § 6013(a)) with Joyce because the New York courts had found his Florida divorce from May (his first wife) to have been invalid. The Commissioner also rejected Harold's alternative contention that if he and Joyce were not entitled to file joint returns, then he should be allowed to take a $600 dependency exemption for Joyce as his "spouse" under § 151 of the 1954 Code. Finally, the Commissioner disallowed Harold's claimed deductions for alimony payments to May and Virginia, since they were not incident to a judicial decree under which the parties were "divorced or legally separated." 1954 Code § 71(a)(1); see also § 215.

The Tax Court sustained the Commissioner's contentions; the Second Circuit, relying on its opinion rendered three days earlier in *Borax* v. *Commissioner,* reversed. (Appendix B., *infra,* pp. 43–48; R. Vol. I, pp. 1(c)–17.)

REASONS FOR GRANTING THE WRIT

1. *Joint Returns and Dependency Exemptions:*

In the *Borax* case the New York Supreme Court, having all of the parties before it, decreed that respondent-husband's *ex parte* Mexican divorce decree was invalid, that Ruth (his first wife) remained his

lawful wife, and that he was not married to Hermine (his second wife). Although every court in the United States is obliged to follow this decision (*Sutton* v. *Leib,* 342 U.S. 402, 407–409), the lower court held that "for tax purposes" the Commissioner must treat respondent as if he were legally married to Hermine (his second wife).

Similarly, in the *Wondsel* case the New York Supreme Court twice held that respondent-husband's *ex parte* Florida divorce from May (his first wife) was invalid and that he was still married to her. First, when May brought declaratory suit the New York court held that respondent's purported marriage to his second wife was invalid; later, the New York court annulled his purported marriage to his third wife on the same ground, *i.e.,* that he was still married to his first wife, May. Nevertheless, the court below, following its *Borax* decision, held that the Commissioner must regard the two *ex parte* divorces as valid and treat respondent as if he were legally married to Joyce (his third wife).

a. A number of important provisions in the Internal Revenue Code turn on whether the taxpayer bears the relationship of "husband," "wife," or "spouse" to another person. The instant case involves some of those provisions: § 6013(a) which permits a "husband and wife" to file a joint income tax return and thus to split their income, and §§ 151–152 which permit a taxpayer to take $600 dependency exemptions for his "spouse," "stepson," "father-in-law," etc. However, the question raised by this case pervades many other

sections of the Code which turn on the existence of a marital relationship.[5] Nowhere does the Code purport to define these terms; nor is there any developed body of federal law on the point. Rather, these words, like many of the other terms used in the Code, take on content and meaning only as they are defined by State law. The courts have long recognized that the State where parties are domiciled has an abiding and important interest in regulating their marital affairs; consequently, questions of marital status have traditionally been governed by the law of the State where the parties are domiciled. See, *e.g., Williams* v. *North Carolina,* 317 U.S. 287, 298–300; *Williams* v. *North Carolina,* 325 U.S. 226, 229; *Eccles* v. *Commissioner,* 19 T.C. 1049, affirmed *per curiam,* 208 F. 2d 796 (C.A. 4). Moreover, this Court has held that once a court with jurisdiction over both parties to a marital relationship has passed on the validity of a purported *ex parte* divorce, that decision

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[5] In fact, respondent Borax has died since this lawsuit was begun and the question whether his estate is entitled to an estate tax marital deduction for amounts passing "from the decedent to his surviving spouse" (1954 Code § 2056) with respect to bequests to Hermine (his second wife) is now pending.

See also, *e.g.*, § 2523 (gift tax marital deduction), § 2513 (marital gift splitting), § 318 (rules for attribution of stock ownership in corporate reorganizations, redemptions, liquidations, etc.), § 267 (disallowance of certain losses and deductions), § 1239 (taxing certain capital gains as ordinary income), § 2516 (gift tax exemptions for certain payments to "spouse" in settlement of marital rights), § 544(a)(2) (personal holding companies), § 554(a)(2) (foreign personal holding companies), § 1235(d) (taxation of gains on sales of patents).

is binding on the parties and entitled to full faith and credit in every other State. *Sutton* v. *Leib*, 342 U.S. 402, 407–409; see also 28 U.S.C. 1738; *Sherrer* v. *Sherrer*, 334 U.S. 343; *Coe* v. *Coe*, 334 U.S. 378; Note, *Divisible Divorce*, 76 Harv. L. Rev. 1233, 1234–1236.

Viewed against this background, we submit that Congress, in employing the words "husband," "wife," and "spouse" in the Code, did not propose to require the Commissioner to treat as valid a foreign divorce and subsequent remarriage which have been declared null and void under the law of the parties' domicile by a court with personal jurisdiction over all of the relevant parties. Congress, we believe, could not have meant the Commissioner to recognize a divorce which is, as between the parties themselves, void for all other purposes. In Judge Friendly's words (dissenting below) Congress did not intend the relationship of husband and wife to be terminated or created "by a piece of paper which has been drained of all legal vitality and [which] no court in the land may lawfully respect in a suit between the parties most concerned" (Appendix A, *infra*, p. 39).

b. This conclusion is further supported by Congress' expressed purpose in enacting the joint return provision, *i.e.*, to place married couples in common law States on a parity with those in community property States. H. Rep. No. 1274, 80th Cong., 2d Sess., p. 22 (1948–1 Cum. Bull. 241, 259). Since, in a community property State, the wife, by operation of law, owns one-half of her husband's income, Congress decided

in 1948 to permit husbands and wives living in other States to split their income by filing a joint return. A community property State would not, however, regard a woman as owning one-half of a man's income, if, although they had gone through a foreign marriage ceremony, she was not, under the law of that State, his wife. Since the joint return provision was intended to achieve parity between persons living in common law and community property States, a man in a separate property State should not be permitted to split his income with a woman to whom he is not married under State law.[6]

In a closely related area, Congress has explicitly specified that "local law" will determine the "relationship" between a taxpayer and a woman with whom he is living. A taxpayer is specifically prohibited from treating a woman as his dependent where "the relationship between [the woman] and the taxpayer is in violation of local law."[7] This provision reflects Congress' view that a taxpayer ought not receive a dependency exemption for a woman with

[6] The Commissioner of Internal Revenue has long taken the position that the Service is not an arbiter of State domestic relations questions; therefore, the Service will recognize an *ex parte* divorce and subsequent remarriage, unless a State court with competent jurisdiction holds it invalid. We believe this to be a clearly valid exercise of the Commissioner's administrative rule-making power.

[7] § 152(b)(5) of the 1954 Code, as amended by P.L. 85-866, § 4(c) (Sept. 2, 1958), retroactive to the enactment of the 1954 Code, codifying the judicial position. See *Turnipseed* v. *Commissioner*, 27 T.C. 758; *Estate of Daniel Buckley* v. *Commissioner*, 37 T.C. 664, 673.

whom he is living in a bigamous or adulterous relationship in violation of local law. S. Rep. No. 1983, 85th Cong., 2d Sess., p. 15 (1958–3 Cum. Bull. 922, 936). Each of the respondents in the instant cases, although judicially determined to be married to his first wife, has gone through a marriage ceremony with another woman. Thus, neither was entitled to a dependency exemption with respect to the subsequent "wife."[8] The Tax Court explicitly so held in *Wondsel* where the question of a dependency exemption for respondent's third "wife" was raised (R., Vol. I, pp. 16–17). Moreover, Congress certainly could not have intended to permit a taxpayer to file a joint return with a woman it had specifically prohibited him from claiming as a dependent.

c. The Second Circuit's decisions in the instant cases conflict with the Ninth Circuit's decision in *Gersten* v. *Commissioner*, 267 F. 2d 195, 199–200. The Second Circuit has held that each respondent could file a joint return as "husband and wife" with a woman to whom the New York Supreme Court had specifically found he was not married. In *Gersten*, on the other hand, the Ninth Circuit held that a taxpayer domiciled in California, who had obtained a

[8] See 39 McKinney's *Consolidated Laws of New York* §§ 100–102 (adultery), §§ 340–343 (bigamy). Since neither respondent's remarriages took place in New York, that State would apparently not regard the remarriages as violating the New York bigamy law. See *People* v. *Hess*, 286 App. Div. 617, 146 N.Y.S. 2d 210. However, both New Jersey and Connecticut, where the remarriages took place, also punish bigamy. New Jersey Stats. Ann. § 2A: 92–1; Conn. Gen. Stats. Ann. § 53–221.

Mexican divorce which was invalid in California, could not file a joint income tax return with his second "wife".[9] There is thus a conflict between the circuits as to whether a taxpayer will be treated as married to a second spouse "for tax purposes," where the earlier *ex parte* divorce from his first wife has been found invalid by a court with personal jurisdiction over the parties.

Whether a woman will be treated as taxpayer's "wife" or "spouse" "for tax purposes" thus depends on the circuit in which his return is filed. While the instant decisions were concerned with a taxpayer's right to file joint returns with his "wife" and to take dependency deductions for his "spouse" and her relatives, the logic upon which the decisions below are bottomed is apparently applicable to numerous other Code provisions which pervade not only the income tax, but also the entire estate and gift tax scheme.[10]

2. *The Alimony Deduction:*

a. The application of the Code provisions considered above turned on a single question: Whether respondents and their current mates might be deemed "husband" and "wife" "for tax purposes." The deductibility of alimony payments does not, however, turn solely on this question. For taxpayers who sepa-

[9] The Commissioner's present position is to accept the validity of a divorce unless it has been declared invalid by a State court. While in *Gersten* there was no California judicial decree that the Mexican divorce was invalid, it is clear that the Ninth Circuit would have reached the same result if there had been such a California decree.

[10] See fn. 5, *supra*, p. 9.

rated from their wives before 1954 (as did both respondents here), the Code treats alimony as income to the wife, and thus deductible to the husband, if it is incident to a court decree under which the parties have been "divorced or legally separated." 1954 Code § 71(a)(1).[11] Thus it is not a prerequisite to deductibility that the marital relationship has been legally dissolved; a valid decree of separate maintenance is sufficient to make alimony payments deductible. However, it is conceded that neither respondent had obtained a decree of separate maintenance. Therefore, the payments here in question are deductible only if made incident to a decree under which the wife has been "divorced * * * from her husband." 1954 Code § 71(a)(1). We submit that since the respondents' *ex parte* Mexican and Florida divorces here in question had been declared invalid by courts with personal jurisdiction over the relevant parties, so that these decrees were entitled to full faith and credit in every State of the Union, they cannot be regarded as having "divorced [either wife] * * * from her husband." Therefore, the payments were not income to the wives and are not deductible by the husbands.[12]

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[11] See 1939 Code § 22(k). The Code gives the husband a deduction only if the payments are taxable income to the wife or former wife. 1954 Code § 215; 1939 Code § 23(u).

[12] The Commissioner has served a protective notice of deficiency on Ruth Borax with respect to the alimony payments she received and her case is now being held by the Second Circuit. If the lower court's decision stands, the Commissioner plans to proceed further against her.

See *Feinberg* v. *Commissioner*, 198 F. 2d 260, 263 (C.A. 3),

The lower court was persuaded by the fact that the 1954 Code also allows a husband to deduct (and thus taxes as income to the wife) payments to his wife whenever there is "a written separation agreement," even though there has been no court proceeding of any kind. 1954 Code § 71(a)(2). However, Congress chose to make this provision applicable only to written agreements executed "after * * * enactment of" the 1954 Code (*ibid.*), *i.e.*, August 16, 1954. Therefore, it does not apply to the separation agreements here in issue which were signed in 1936 and 1946. The opinion below in effect overturns Congress' decision not to make the 1954 amendment applicable to pre-1954 agreements.[13]

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which allows the husband an alimony deduction in circumstances similar to the instant cases; there, the Tax Court had held against the taxpayer on other grounds and the court of appeals reversed without discussing the statutory language quoted above in text.

[13] The lower court attributed great weight to Congress' supposed intention to achieve some measure of uniformity in the treatment of alimony payments. This reliance is misplaced. Before 1942 the Code did not explicitly deal with the deductibility of alimony payments. Therefore, this Court, applying general income tax principles, decided that alimony payments could be deducted only under unusual circumstances, depending principally on State law regarding an ex-husband's duty to support his ex-wife. See *Helvering* v. *Fitch*, 309 U.S. 149. In order to eliminate this dependence on variant and uncertain State law regarding the duty of support, Congress enacted the predecessors to present §§ 71 and 215, making payments deductible whenever they were incident to a decree which "divorced or legally separated [a wife] from her husband." 1939 Code § 22(k), added by the Revenue Act of 1942, c. 619, § 120(a), 56 Stat. 798, 816, now 1954 Code § 71(a)(1). These

b. The deductibility of respondents' alimony payments is a question of considerably less administrative significance than the first question presented by this petition. It can arise only with respect to payments made under pre-1954 separation agreements which were subsequently ratified by an invalid divorce decree; if a written separation agreement had been entered into after 1954 the husband would have been entitled to a deduction (and his wife would have had income) without any further judicial action at all. Even so, an appreciable number of taxpayers may be affected by the Second Circuit's decision on this point. In addition, resolution of the second question seems appropriate in light of its intimate relationship to the first question raised—a question (as shown above) which has very substantial administrative importance.

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sections demonstrate on their face that Congress manifestly did not then intend to make the tax treatment of alimony payments independent of variant State laws on divorce and separate maintenance. Not until enactment of the 1954 Code did Congress choose to remove the statutory relationship between alimony payments and State divorce and separate maintenance law, and then it did so only with respect to written separation agreements entered into after 1954. § 71(a)(2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1965.

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*In lieu of the Solicitor General, who has disqualified himself.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 282–283—September Term, 1964.

(Argued January 19, 1965. Decided July 30, 1965)

Docket Nos. 29230–31

ESTATE OF HERMAN BORAX, DECEASED, HERMINE H. BORAX, LOUIS BORAX AND BENJAMIN BORAX, EXECUTORS,

and

HERMINE BORAX, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Before: MOORE, FRIENDLY AND MARSHALL, *Circuit Judges*

Petition to review a decision of the Tax Court, W. M. Drennen, *Judge,* 40 T.C. 1001 (1964), which determined income tax deficiencies against petitioners for the years 1952 through 1955, and 1957. Reversed.

MARSHALL, *Circuit Judge:*

This case arises from the fact that Congress, as it often must, has relied on nonfederal bodies of law to give content to primary legal concepts, such as marriage and divorce, that are employed in the federal tax scheme.

Herman and Ruth Borax were married in New York City in 1935. They lived there and had one son. By 1946 the marriage floundered. On March 14, 1946 they separated by mutual consent, and executed a separation agreement, which, among other things, gave Ruth custody of their son and obliged Herman to pay $575 a month for the support of Ruth and the child. These payments, amounting to $6,900 per year, were increased to $8,550 per year by a consent decree, which reformed the separation agreement and was entered by the Supreme Court of New York on November 22, 1946. Herman faithfully discharged this obligation throughout his lifetime.

On August 7, 1952, some six years after the separation a divorce decree was entered by a civil court in the State of Chihuahua, Mexico. The decree recited that the proceedings were instituted by Herman Borax against Ruth Borax, giving as grounds for the divorce "the incompatibility of characters"; that Herman had "personally appeared in this Court on the 26th. of June last" and had "submitted a certificate of residence of this City"; and that Ruth was served on July 10 "by the corresponding authority of New York, New York, as is of record," but that "she did not appear to answer the complaint." The Court noted that it was "competent to hear and pass on the present case according to Article 23 of the Law of Divorce [of the State of Chihuahua], in view of the fact that the plaintiff submitted to this juris-

diction"; and it concluded that "plaintiff proved his action" because of the failure of the defendant, Ruth, to appear and to answer the complaint. The marriage was declared dissolved.

To no one's surprise, several weeks later Herman Borax remarried, this time to Hermine. There were two wedding ceremonies: the first occurred on August 21, 1952 in Juarez, Mexico, where the divorce proceedings were instituted, and the second took place in New Haven, Connecticut on August 29, 1952. Herman and Hermine Borax thereafter lived together in New York City. Herman died in 1961.

Soon after the divorce and remarriage, the first wife, Ruth, commenced declaratory proceedings in the Supreme Court of New York, New York County. She attacked the validity of the divorce and the second marriage, and sought a judicial declaration that she was still Herman's lawful wife. The court had personal jurisdiction over Herman and Hermine; they were personally served and actively participated in the suit with the assistance of counsel. In accordance with its opinion, 119 N. Y. S. 2d 819, which merely commented that Ruth "was not served and did not appear in that action," the Court entered an order on February 3, 1953 declaring that Ruth "is the lawful wife of" Herman, that Herman and Hermine "are not husband and wife," and that "the decree of divorce" obtained by Herman "is invalid, and of no force or effect in law."

As though this human situation was not complicated enough, with a Mexican court and New York court taking different views as to who was Herman's wife, the Commissioner of Internal Revenue stepped into the picture, asserting deficiencies for the years 1952 through 1955 and 1957. During each of these years

Herman and Hermine filed joint returns and claimed a deduction for the payments Herman had made to Ruth under the 1946 separation agreement and claimed dependency exemptions for Hermine's parents and her children by a prior marriage. The Commissioner took the position that Herman and Hermine were not husband and wife; that they were not entitled to file a joint return; that Herman was not entitled to claim Hermine's children or parents as his dependents; and that the payments to Ruth were not deductible to Herman. Herman [1] and Herman petitioned the Tax Court for a redetermination of the deficiency, asserted by the Commissioner for those years, but the Tax Court sustained the Commissioner's position,[2] 40 T.C. 1001 (1964). Pursuant to sections 7482–83 of the 1954 Code, taxpayers filed petitions to review this decision, and we reverse.

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[1] Soon after filing the petition in the Tax Court, Herman died, and his executors have been substituted as parties in his stead. For simplicity, references shall be made herein to Herman rather than his executors.

[2] The Commissioner has taken the position that if the payments are held deductible to Herman, then, of necessity, they must be includible in the gross income of Ruth. Deficiencies were asserted against Ruth for she failed to include these amounts in her gross income, or for that matter to file any returns for the years in question. To preserve his rights on this alternative position, the Commissioner has filed a petition for review of the Tax Court decision which was in favor of Ruth. The Commissioner moved that this petition be held in abeyance pending a final decision on the petition for review filed by Herman's estate and Hermine; Ruth approved of this procedure; and this Court granted the Commissioner's motion.

I. THE SUPPORT PAYMENTS

Under section 23(u)[3] of the 1939 Code, and its counterpart in the 1954 Code, section 215,[4] the payments made by Herman to Ruth under the 1946 separation agreement are deductible to Herman if they are includible in Ruth's gross income according to section 22(k) [5] of the 1939 Code or section 71 [6] of the

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[3] "*Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year."

[4] "*Alimony, Etc., Payments.*—

"(a) *General Rule.*—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year."

[5] "*Alimony, Etc. Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband."

[6] "*Alimony And Separate Maintenance Payments.*—

"(a) General Rule.—

"(1) *Decree of divorce or separate maintenance.*—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation."

1954 Code. In terms of the present case, where the separation agreement was executed prior to the enactment of the 1954 Code, and there is no decree of separate maintenance,[7] these payments are includible in Ruth's gross income, and hence deductible by Herman if: (1) Ruth and Herman were divorced under a decree of divorce; (2) the payments were made in discharge of a legal obligation imposed upon or incurred by Herman under such decree or under a written instrument "incident to such divorce"; and (3) the payments were periodic and received subsequent to the divorce decree.

(1) We hold, for purposes of these provisions of the federal tax statute, and within the meaning of these provisions, that for the years in dispute Ruth and Herman were divorced under a decree of divorce. The subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is of no consequence under these provisions of the tax law.

This rule of validation tends to promote some measure of certainty and uniformity—important goals of the federal tax scheme; see *Commissioner* v. *Lester*, 366 U.S. 299, 301 (1961), declaring "that it was the intention of Congress, in enacting § 22(k) and § 23(u) of the [1939] Code, to eliminate the uncertain and inconsistent tax consequences resulting from the many variations in state law." Where, as here, the divorcing jurisdiction is not one of the States of the

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[7] Herman had taken a deduction for the support payments for the years 1949 and 1950 under the theory that the 1946 New York decree reforming the separation agreement sanctioned the separation and was therefore in effect a decree of separate maintenance for the purpose of section 22(k) of the 1939 Code. This position was rejected by the Tax Court, 30 T. C. 817 (1958).

Union, and the decree has only the benefit of comity rather than the Full Faith and Credit Clause of the Constitution, the States are free to take different views as to the validity of the divorce. The possibility of disparity even exists if the divorcing jurisdiction is within the Union. For under the existing pattern of law, a divorce decree is not entitled to full faith and credit unless the rendering state has jurisdiction, and the rendering state's finding of jurisdiction is not itself entitled to full faith and credit. Although federal standards will be applied to determine if there is jurisdiction for full-faith-and-credit purposes, *Williams* v. *North Carolina* (*II*), 325 U.S. 226, 231 n. 7 (1945) (domicile), the Supreme Court is not in a position to resolve all such sister-state conflicts, see, e.g., *Colby* v. *Colby,* 78 Nev. 150, 369 P. 2d 1019, *cert. denied,* 371 U.S. 888 (1962), and it would not be advisable for this court (or the Tax Court) to attempt such a resolution in these most collateral tax-deficiency proceedings. The rule of validation leaves the mobile spouse with the power to obtain a divorce in a jurisdiction whose decrees might not be recognized in every other jurisdiction. Yet by depriving the determination of invalidity of any federal tax significance the rule of validation avoids a measure of unevenness and uncertainty: all those taxpayers who have obtained a divorce in a particular jurisdiction are treated the same, regardless of whether the spouse against whom the decree has been obtained is able to, and does, invoke the power of another jurisdiction to declare that divorce invalid.

This interest in uniformity might not by itself justify a rule of validation, but there is an additional factor. The rule tends to further the "indicated congressional policy of placing the tax burden of all gen-

eral marriage settlement payments on the party entitled to their enjoyment," *Lerner* v. *Commissioner*, 195 F. 2d 296, 298 (2 Cir. 1952), and it does so without interfering with any other congressional tax policy. The requirement that the marital relationship be dissolved by a judicial decree of divorce (or legal separation) as opposed to being dissolved by having the parties cease living together as husband and wife is not expressive of any significant policy. This was amply revealed in 1954 when Congress afforded the same tax treatment to support payments where the husband and wife are voluntarily separated and there is a written separation agreement. See generally *Mavity* v. *Commissioner*, 341 F. 2d 865, 870 (2d Cir. 1965). If support payments are includible in the gross income of the wife and deductible by the husband when the parties are voluntarily separated, the same treatment should obtain when the husband and wife are "divorced" in the sense in which Ruth and Herman were divorced—they ceased living together as husband and wife, they lived separately, and one party had obtained a decree dissolving the marital status, although the other had the decree declared "invalid" by a court of another jurisdiction.

This particular liberalization of the conditions under which support payments are includible in the gross income of the wife and deductible by the husband occurred in 1954, two years after the date of the Mexican decree. Yet it would be most undesirable to restrict the recognition of the Mexican divorce to the years following 1954; and those principles and aspects of the tax scheme, including the general income-splitting provisions for a husband and wife filing a joint return, that made it appropriate to charge the wife-recipient with the support payments and to al-

low a deduction for the husband-payor, were already in existence in 1952. Moreover, we do not regard the fact that this liberalization required that there exist a separation agreement executed after the enactment of the provision as removing one of the underpinnings of the rule of validation as applied in this case, involving a "divorce" that preceded that date. We understand this limitation to express a Congressional desire not to upset established preexisting arrangements that most likely had taken possible tax effects into consideration in determining the size of the payments, see *Mavity* v. *Commissioner, supra,* 341 F. 2d at 868. It did not reflect the judgment that voluntary separation formalized by an agreement executed prior to that date were not in principle entitled to the tax treatment afforded to voluntary separations formalized by an agreement executed after that date. Presumably the tax consequences of the 1952 Mexican divorce were not anticipated in the 1946 agreement.[8] But that would be true even if the Mexican divorce were left uncontested or declared valid in the subsequent New York declaratory proceeding. The proper remedy would seem not to adjust the tax statutory concept of a divorce but to adjust the size of the payments, if need be, through state judicial proceedings.

The only circuit case law on point, *Feinberg* v. *Commissioner,* 198 F. 2d 260 (3 Cir. 1952), supports the rule of validation, and it is not without significance that this authority was established in 1952—at a time when the Mexican divorce was obtained and

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[8] But it should be noted that in 1946, see *supra* p. 3094, Ruth sought a reformation of the separation agreement to provide her with funds "to take care of her Federal and New York State income taxes" on the payments received under the agreement, see 30 T.C. 817, 818 (1958).

the New York declaratory proceedings were commenced, prior to the 1954 liberalization of the relevant deductibility provisions in the tax code, and far enough back to justify the accretion of reasonable expectations. The parties in *Feinberg* were married in New York in 1918 and continued to live there for the twenty years of their married life. In February 1940, after marital difficulties, they entered into a separation agreement; and in March of that year the husband instituted divorce proceedings in a Florida court. The wife did not appear, either in person or through counsel, and service was by publication only. In May the decree of divorce dissolving the marital relationship was obtained and in June the husband married again, this time in New Jersey. In 1941 the first wife commenced proceedings in New York, seeking in part a declaration that the Florida decree is invalid. A consent judgment was entered in November 1942 declaring the first wife to be the "true and lawful wife." The husband sought a contrary determination by raising the issue as a counterclaim in a subsequent action commenced by the wife the next year to enforce the separation agreement, but he failed. On these facts, the Third Circuit declared: "The mere fact that the marital domicile of the parties did not recognize the Florida divorce does not render it a nullity for Federal income tax purposes." 198 F. 2d at 263.

The court below sought to distinguish *Feinberg* on the ground that there the husband and the second wife were residing in New Jersey rather than New York when the New York court entered its consent judgment declaring the Florida divorce invalid. There is some doubt as to whether this was so, since the Tax Court opinion in *Feinberg* states that the husband was domiciled in New York until December

16, 1943, 16 T.C. 1485. In any event, the Third Circuit did not intend anything to turn on where the husband and the second wife were residing at the time of the declaration of invalidity of the divorce, nor should anything turn on it. If domicile and residence are to play any role in deciding whether the subsequent declaration of invalidity should be recognized, and we doubt whether they should, it would be the domicile of the first marriage and the domicile and residence of the first wife, the party seeking the declaration of invalidity, that would be relevant. And in both *Feinberg* and the instant case, save for the husband's journey to the divorcing jurisdiction, the husband and his first wife lived in New York during their entire married life together, and the first wife continued to live there after the divorce.

In concluding that Herman and Ruth were divorced for these tax purposes, notwithstanding the New York judgment declaring the Mexican divorce decree invalid, it is important to delineate two situations not before us.

First, we are not dealing with the situation where the rendering jurisdiction itself declares the divorce obtained invalid. See *Estate of Daniel Buckley,* 37 T.C. 664 (1962). To conceive that in such a situation the parties might not be considered divorced for these tax purposes is not irreconcilable with the position we take here, where a jurisdiction other than the one that granted the divorce declared it invalid. This distinction, which we do not pass on but merely declare to be possible, would not unfairly discriminate against the immobile wife receiving payments under a prior separation agreement who is interested in protecting herself against the unanticipated tax consequences of having to include the support payments

within her gross income. If the husband refused to adjust the size of the payment accordingly, the immobile wife could commence, in the same jurisdiction that would be prepared to declare or had declared the divorce of another jurisdiction invalid, an action for the reformation of the separation agreement, and if need be, this reformation could be in the style of a *nunc pro tunc* order.

Secondly, we are not dealing with a situation where the rendering jurisdiction's concept of a divorce is totally alien to that contemplated by the tax laws. The test would not be whether the divorce would be declared invalid in every state, but rather whether the divorce frustrated the revenue purposes of the tax laws. We do not view the Mexican divorce Herman had obtained as failing this test, although it contains certain extreme elements, such as the ground of divorce ("incompatibility of character") and the apparent basis of the court's jurisdiction (the fact that the plaintiff had "submitted himself to the jurisdiction of the court" and that he resided in the jurisdiction long enough to obtain a certificate of residence). It would be most unfortunate if we were to interpret the concept of a divorce, as employed by these provisions of the tax law, to require something more than the incompatibility of character as a reason for dissolving the marital relationship. And it is difficult to understand why this concept would be inconsistent with lax jurisdictional standards, even if the defendant's connection with the rendering jurisdiction were so minimal as to raise doubts as to whether the assumption of personal jurisdiction would be consonant with due process of law (if the rendering jurisdiction were a State), and even if the requirement that one of the parties be a domiciliary of the rendering jurisdiction is dispensed with. New York, for example,

regards the fact that a marriage took place in the state as a sufficient jurisdictional nexus, N. Y. Domestic Relations Law § 170; *David-Zieseniss* v. *Zieseniss,* 205 Misc. 836, 129 N. Y. S. 2d 649 (Sup. Ct. 1954), and a few states have considered residence alone to be sufficient, Note, *Divisible Divorce,* 76 Harv. L. Rev. 1233, 1248, n. 99 (1963) citing the state statutes. See generally, *Alton* v. *Alton,* 207 F. 2d 667 (3 Cir. 1953), *vacated as moot,* 347 U.S. 610 (1954); *Rosenstiel* v. *Rosentiel,* —N. Y. 2d—(Ct. App. July 12, 1965). An interpretation of the concept of divorce that is expansive enough to accommodate these differences is certainly consistent with the revenue purposes of these provisions of the tax law. We make no pretense of deciding which decrees called a "divorce" would not be consistent with these purposes.

(2) We also find the second condition of deductibility set out above to be satisfied. Specifically, we hold that the payments were made in discharge of a legal obligation incurred by Herman under a written instrument (the 1946 separation agreement) and that this written instrument was incident to the 1952 Mexican divorce.

Paragraph 4 [9] of the separation agreement provided that Herman's obligation to make the support

[9] "4. That, while both parties hereto shall remain alive, and so long as the Second Party shall fully keep, observe and perform the terms, provisions, covenants and conditions hereof to be kept, observed and performed by her, and so long as the marriage of the parties hereto shall not be dissolved by any order, judgment or decree entered against the Second Party, the First Party shall pay to the Second Party, as hereinbefore provided, the sum of Five hundred and seventy-five ($575) Dollars per month, on the 15th day of each and every month, beginning with the month of March, 1946, as full, fair and reasonable provision for the Second Party and for the maintenance, education and support of said child, except as aforementioned * * *."

payments to Ruth were to continue "so long as the marriage of the parties * * * shall not be dissolved by any order, judgment or decree entered against" Ruth. We do not, however, interpret this provision to mean that Herman's legal obligation to make the payments to Ruth was terminated when he obtained the Mexican divorce. If this provision were to be given its most literal effect, it would conflict with the next following paragraph [10] which provides that the "foregoing payments" are in full satisfaction and discharge of any alimony Ruth may claim in any action by either party. Confronted with this inconsistency it is entirely appropriate to give the quoted language of paragraph 4 less than its most literal effect. The termination provision appears to have a punitive purpose and should be confined to divorce in which a court, having *in personam* jurisdiction over Ruth, found her guilty of misconduct. The Mexican divorce obtained by Herman does not fit that description. It would make little sense for Ruth to agree to a provision which allows Herman to terminate his obligation to support her by obtaining an *ex parte* divorce granted on the ground of incompatibility of character and which made no explicit provision of its own for alimony. Neither party understood Herman's support obligation under the agreement to have come to the end after the Mexican decree, and it makes little difference whether that understanding was derived from their intent to exclude such *ex parte* divorces from the scope of the termination provision or from

[10] "5. That the foregoing payments shall be in full satisfaction and discharge of any and all alimony, whether permanent or temporary, which the Second Party may claim, or be awarded, in any action that may hereafter be brought by either party against the other."

the subsequent judgment of a New York court declaring the decree invalid. There would be no inconsistency between, in one sense, denying recognition to a subsequent declaration of invalidity for purposes of deciding whether the parties were divorced within the tax law and, in another sense, granting recognition to that declaration of invalidity for purposes of deciding whether Herman's obligations under the separation agreement have been terminated.

We also find, as odd as it may seem on first blush, that the 1946 separation was incident to the divorce decreed in 1952. The term "divorce" in this phrase "incident to such divorce" has been interpreted to refer to the status of divorce rather than the decree of divorce, *Newton* v. *Pedrick*, 212 F. 2d 357, 361 (2 Cir. 1954) and thus it is of no consequence that the Mexican decree did not refer to the separation agreement except in connection with custody.[11] Nor does the fact that the separation agreement had been executed at a time when presumably the parties were not contemplating divorce bar a finding that the agreement was incident to the divorce eventually obtained.

In *Commissioner* v. *Moses*, 214 F. 2d 912, 913–14 (2 Cir. 1954), *cert. denied*, 348 U.S. 913 (1955), this Court noted that the wife was "adamant" against divorce and that she did not agree to the separation agreement "in contemplation of any divorce." Yet we held that there was sufficient "nexus" between the

[11] "THIRD.—It having been stated in the complaint that there is one son of the marriage, named JAMES STEPHEN BORAX who is with its mother, and according to the opinion of the Agent for the State's Attorney's Office, said son shall remain under the same condition as he now is in, and since there exists an agreement of separation signed by and between the parties, this sentence shall not alter such particulars."

divorce and the agreement, quoting language of *Lerner* (195 F. 2d at 298) that "where the payments obviously take the place of alimony and otherwise satisfy the stringent requirements of I.R.C. § 22(k), although not formally incorporated into the decree, they should not be denied effect under the statute merely because there is no evidence that divorce and settlement were not contemporaneously planned and carried out." A further step was taken in *Holt* v. *Commissioner*, 226 F. 2d 757, 758 (2 Cir.), *cert. denied*, 350 U.S. 982 (1955), where the wife was so "adamant" against divorce, that, unlike the wife in *Moses*, she refused "to include in the agreement any reference to a possible divorce or a clause relative to the incorporation of the terms of the agreement in any decree of divorce." This Court nevertheless held that the parties' intent was "immaterial" and that the written separation agreement is incident to the divorce because the "legal obligation to support survives the dissolution of the marital relationship."

In *Holt* and *Moses* the span of time between the execution of the separation agreement and the decree of divorce was substantially less than the six years present in the instant case. However, if, as *Holt* and *Moses* decide, there is no requirement that the parties contemplate, intend or plan a divorce at the time of entering the separation agreement there is no reason for making the lapse of time determinative. Moreover, even if *Moses* be read to require "that the possibility of a divorce be realized" by the wife when she executed the separation agreement, 214 F. 2d at 914, a requirement that seems to serve no statutory purpose, the paragraph in the 1946 agreement providing that the "foregoing payments" are in full satisfaction of any *alimony* Ruth may claim in any action

by either against the other is evidence of such a realization. Finally, in our case, unlike *Holt* and *Moses,* the separation agreement contained a terminating provision conditioned upon a divorce decree against Ruth. Yet we interpreted that provision not to be operative upon obtaining the divorce Herman had in fact obtained, and thus, as in *Holt* and *Moses,* the legal obligation incurred by Herman under the 1946 agreement to support survived the 1952 divorce. These decisions holding that a separation agreement is incident to a divorce if the obligation for support imposed by that agreement survives a divorce do not put a judicial gloss on the statutory phrase "incident to." They merely conceive of the required nexus in functional rather than causal terms: the agreement is incident to the divorce because the payments required under that agreement serve the same function as judicially decreed alimony.

(3) There can be no doubt that the payments are periodic within the meaning of the statute and that the payments for the years 1953–1955, and 1957 were subsequent to the alleged divorce. But it is not clear from the stipulation of the parties or the record before us whether all the payments received in 1952 were received subsequent to August 7 of that year, the date upon which the Mexican decree of divorce was entered. Of course, even if it is determined that the payments were not all received subsequent to date, an apportionment for 1952 may not be required; arguably the statute could be interpreted to mean that *all* payments received in the same year as in which the divorce is obtained can be deemed to be received after the decree for purposes of includibilty in the gross income of the wife and the deductibility for the husband for that year. (Compare § 143, § 153, § 6013

of the 1954 Code, providing, in another context, that for taxpayers having the same taxable year, the marital status shall be determined at the close of the taxable year.) We need not reach that question, however, for we understand the Commissioner, through his silence on this point, to concede that all the payments received in 1952 were received subsequent to August 7 of that year.

II. THE JOINT RETURNS AND DEPENDENCY EXEMPTIONS

Section 51(b) of the 1939 Code, and its counterpart in the 1954 Code, section 6013, allow a husband and wife to file a single return jointly, and provide that the marital status shall be determined at the close of their taxable year if both have the same taxable year. Herman and Hermine filed joint returns for the years 1952 through 1955 and 1957, and we hold that the marriage performed in Mexico and Connecticut in 1952 following Herman's divorce from Ruth entitled them to the benefit of these sections for those years.

The Commissioner insists that for purposes of filing joint returns marital status must be determined in accordance with the law of the state of domicile, and that Herman and Hermine were not entitled to file a joint return because a court in the state of their domicile for the years in dispute, New York, had declared them not to be husband and wife. While there is much to be said against a rule resolving all conflicts in marital status in terms of the domicile of the parties, since it would attach important tax consequences to changing a home from state to state, and although the Commissioner has on occasion taken a contrary position, see Rev. Rul. 58-66, 1958 1-2 Cum. Bull. 60 (common law marriages), we do not pass on that broader issue here. The New York declaration

of invalidity of the marriage between Herman and Hermine was predicated solely on the view that the Mexican divorce by Herman and Ruth was invalid; and it would make little sense for us to recognize the Mexican divorce for the purposes we did, and at the same time recognize a judgment which was predicated on a refusal to recognize that divorce. *Cf.* S. Rep. No. 1013, 80th Cong., 2d Sess. [1948], 2 U.S. Code Cong. & Ad. News 1212, declaring that "a uniform construction" of all the provisions dealing with the determination of marital status, including those related to joint returns and "alimony and like payments," is intended.

Gersten v. *Commissioner*, 267 F. 2d 195, 199–200 (9 Cir. 1959), relied upon so heavily by the Commissioner, did not involve a state court judgment declaring the second marriage invalid because of the invalidity of the divorce from the first marriage. Instead, it involved a state prohibition against remarrying that operated independently of whether the divorce obtained in a foreign jurisdiction was valid. The first wife had obtained an interlocutory decree of divorce in California some seven months before the husband obtained a Mexican divorce and remarried there, and the Ninth Circuit held the second marriage invalid for tax purposes because California was the state of domicile of all the parties and because it read California law to provide that "in no case can a marriage of either of the parties during the life of the other be valid in California if contracted within one year after the entry of an interlocutory decree of divorce." In contrast, in the instant case the claimed invalidity of the second marriage is entirely derived from the invalidity of the divorce of the first marriage. We found it consonant

with the tax purposes to recognize this divorce, and hence the underpinnings of not recognizing the second marriage are removed.

Similarly, for purposes of determining whether under section 25 of the 1939 Code and section 152 of the 1954 Code Herman and Hermine were entitled to take dependency exemptions on their joint returns for Hermine's parents and her minor children of a former marriage, we also hold that they were married.

Reversed.

FRIENDLY, *Circuit Judge* (dissenting):

Although, as was said of another ruling as to divorce, "I do not suppose that civilization will come to an end which ever way this case is decided," *Haddock* v. *Haddock,* 201 U.S. 562, 628 (1906) (Mr. Justice Holmes dissenting), I cannot subscribe to my brother's disposition of this appeal.

I agree Congress did not intend that the Commissioner in making tax determinations revolving around marital status, or the courts in passing upon them, should set themselves up as domestic relations tribunals. Hence I would join with the majority if the Mexican divorce stood unimpeached, even though we would have every reason to believe a New York court would have annulled it at Ruth's request, since New York regards such an *ex parte* Mexican decree as "a clear legal nullity * * * and of no more validity than a so-called mail-order divorce," *Rosenbaum* v. *Rosenbaum,* 309 N.Y. 371, 376 (1955).[12] But here we need

[12] Nothing to the contrary was held in the recent cases of *Rosenstiel* v. *Rosenstiel,* —— N.Y. 2d —— (1965), and *Wood* v. *Wood,* —— N.Y. 2d —— (1965), decided since this appeal was argued.

not speculate whether Ruth would accept the divorcee status Herman sought to thrust upon her or what a New York court would do if she didn't. New York, the state where Herman and Ruth had lived and Herman and Hermine were living, through a court having personal jurisdiction over all persons in this triangle, adjudged at Ruth's instance that the *ex parte* Mexican decree "is invalid, and of no force or effect in law," that Ruth was Herman's lawful wife, and that Herman and Hermine "are not husband and wife." See *Borax* v. *Borax,* 119 N.Y. S. 2d. 819 (Sup. Ct. 1953).

Under the Constitution that judgment not only is binding in New York but is entitled to recognition in every state, as indeed it would be if the challenged divorce had been granted by a sister state. *Sutton* v. *Leib,* 342 U.S. 402, 407–09 (1952). By statute, 28 U.S.C. § 1738, coming down from the first Congress, 1 Stat. 122 (1790), it is entitled to full faith and credit "in every court within the United States." I find no basis for believing that when Congress spoke of a wife who is "divorced," 1939 I.R.C. § 22(k), 1954 I.R.C. § 71(a)(1), it meant a wife who had been pronounced to be so by a piece of paper which has been drained of all legal vitality and no court in the land may lawfully respect in a suit between the parties most concerned. I am equally unable to understand how, under modern developments in the law of collateral estoppel, Herman and Hermine can challenge, as against the Commissioner, a proposition which, after full opportunity, they unsuccessfully challenged against Ruth, see *Kurlan* v. *C. I. R.,* 343 F. 2d 625, 628 n. 1 (2 Cir. 1965), and authorities there cited—especially when one result of a successful challenge should be a tax against Ruth on the

amounts sought as a deduction by Herman. Yet, as to this last, I cannot see how when the Commissioner, confronted with my brothers' decision, presses his protective petition to review the Tax Court decision annulling the determination of a deficiency against Ruth, we could overcome her reliance on the New York judgment consistently with 28 U.S.C. § 1738, save by giving the language of the Revenue Codes a construction which, as indicated, I think indefensible. If that be so, it sufficiently indicates the error in the decision here.

I recognize that my view puts me in conflict with *Feinberg* v. *C. I. R.*, 198 F. 2d 260 (3d Cir. 1952), since I join my brothers in finding the Commissioner's distinctions of that case insubstantial. But my regret in having to part company with another court of appeals is lessened by my inability to follow the majority's distinction of *Gersten* v. *C. I. R.*, 267 F. 2d 195, 199–200 (9 Cir. 1959). The two decisions seem basically inconsistent; indeed, *Feinberg*, where a judgment had decreed the divorce to be invalid, was in some ways a stronger case for the Commissioner than *Gersten*. We thus cannot avoid conflict with another circuit, however we decide this case.

I would affirm.

JUDGMENT

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of July one thousand nine hundred and sixty-five.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. THURGOOD MARSHALL, *Circuit Judges.*

ESTATE OF HERMAN BORAX, DECEASED, HERMINE H. BORAX, LOUIS BORAX AND BENJAMIN BORAX, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeals from the Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

A. DANIEL FUSARO, *Clerk.*

JUDGMENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of July one thousand nine hundred and sixty-five.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. THURGOOD MARSHALL, *Circuit Judges.*

HERMINE BORAX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeals from the Tax Court of the United States

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said the Tax Court of the United States be and it hereby is reversed.

A. DANIEL FUSARO, *Clerk.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cal. 437—September Term, 1964

(Argued May 6, 1965. Decided August 2, 1965

Docket No. 29313

HAROLD E. WONDSEL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Before: MOORE, SMITH and HAYS, *Circuit Judges.*

Petition to review a decision of the Tax Court, unreported, sustaining the Commissioner's determination of income tax deficiencies for the years 1957–59.

Reversed in part and affirmed in part.

MOORE, *Circuit Judge:*

The Commissioner of Internal Revenue (the Commissioner) determined income tax deficiencies on the part of Harold E. Wondsel (Harold) for the years 1957–59. Harold sought review of those determinations and the Tax Court upheld them. Harold now seeks review of the Tax Court's decision. The pri-

mary question concerns the effect for income tax purposes of a state court decision declaring void an *ex parte* divorce obtained in another jurisdiction, and not attacked in that jurisdiction, on a taxpayer's status as divorced or married.

In 1927 Harold married May in New York. In 1936, still in New York, they executed a separation agreement which provided in relevant part that Harold pay May $65 a week for her support and that in case of a divorce the terms relating to support should, at May's election, be incorporated into the decree. Then in 1937 Harold obtained *ex parte* a Florida decree of divorce from May. The decree provided, *inter alia*, that Harold pay May $65 a week. In 1939 Harold married Virginia in Connecticut. In 1941 May obtained in New York an uncontested judgment that she was Harold's wife, that the Florida divorce decree was null and void, and that Harold's marriage to Virginia was null and void. In February 1946 Harold and Virginia executed in New Jersey, where they had been living, a separation agreement which provided that Harold pay Virginia $200 a month for her support and that in case of divorce the agreement should be incorporated in the decree as a complete settlement of all alimony rights. In July 1946 Harold again journeyed to Florida and obtained *ex parte* a decree of divorce from Virginia. The decree recited that the separation agreement had been approved by the court. Three months later Harold married Joyce in New Jersey, where they lived for two years before moving to Connecticut. Then in 1949 Harold agreed orally to increase his monthly payments to May by $15 a week, making them $80 a week. In 1950 Harold and Joyce moved to New York. For completeness we note that in 1961, after the tax years in question,

Harold's marriage to Joyce was annulled in New York at her request, without opposition, on the ground that he was still married to May.

During 1957–59 Harold paid $80 a week to May for her support, which she declared as income and upon which she paid taxes. Harold also paid $200 a month to Virginia, which she declared as income and upon which she paid taxes. Harold deducted both alimony payments from his gross income. Finally, Harold and Joyce filed joint returns in which Harold took a dependency deduction for Joyce. The Commissioner and the Tax Court have held that the alimony and dependency deductions were improper because the Florida divorce decree against May had been declared invalid in New York.

As to the alimony, sections 71(a) and 215 of the Internal Revenue Code of 1954 (the Code) provide in relevant part that a taxpayer husband may deduct from his gross income periodic payments to his divorced wife if they are "divorced * * * under a decree of divorce" and if the payments are "received after such decree in discharge of * * * a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce." In brief, the Commissioner argues that for income tax purposes Harold and May are in no sense divorced and payments to her cannot be deemed in discharge of an obligation imposed under an instrument "incident" to a divorce. The same applies, it is argued, to Virginia. Moreover, as to her, it is said that because Harold was never divorced from May he could not ever be considered as married to Virginia and, consequently, could not be divorced from her. Furthermore, because Harold could not be regarded as having divorced May or

Virginia it is contended that he could not be considered as married to Joyce.

All force has been taken from these arguments by the recent decision in *Estate of Herman Borax* v. *Commissioner*, — F. 2d — (2d Cir. 1965), the reasoning of which we adopt here. There the taxpayer had obtained *ex parte* in Mexico a divorce from his first wife and had remarried shortly after, both in Mexico and in Connecticut. The new ménage returned to New York, where the old one had been located and where the first wife was still living. She quickly obtained in the New York courts a contested judgment that she was still the taxpayer's legal wife, that the Mexican divorce was invalid, and that the second marriage was also invalid. Prior to the "divorce" the taxpayer had executed a separation agreement which provided that he make payments to the first wife for her support. After the New York judgment, the taxpayer continued to make payments to the first wife but she failed to include them as income to her; indeed she failed even to file a tax return. The taxpayer filed a joint return with his second wife. We held that the divorce did not terminate the obligation to make payments under the terms of the agreement, that the agreement was "incident" to the divorce for the purposes of the Code, and that the divorce was to be given effect for tax purposes, at least so long as it had not been declared invalid by a court of the rendering jurisdiction.

Here there is no question that the obligations to make the payments provided in the agreements were not terminated by the respective divorces. Moreover, there is no question that each agreement was "incident" to the divorce decree in question. While *Borax* dealt specifically with the Internal Revenue

Code of 1939, the relevant provisions of the 1954 Code are substantially the same.

Here the divorce was decreed not by a foreign country but by a sister state. In *Borax* the divorcing jurisdiction—Mexico—would be under no obligation, save that flowing from comity, to give effect to the New York judgment declaring the invalidity of the Mexican divorce. Here it does not seem that Florida would be required by the full faith and credit clause of the Constitution to acquiesce in New York's declaration as to the validity *vel non* of the Florida divorce. See, *e.g., Colby* v. *Colby,* 78 Nev. 150, 369 P. 2d 1019, *cert. denied,* 371 U.S. 888 (1962), 63 Colum. L. Rev. 560 (1963). Therefore the decree had not been drained of all validity. And, there is no indication that New York would treat Harold differently for its comparable tax laws than the Commissioner should for federal tax purposes under *Borax.* Therefore it cannot really be said that the New York decision as to validity is not given the same effect as it would have in New York when it is considered as having some effect for federal tax purposes.

And, in *Borax* the wife who received the alimony payments had not reported them as income nor paid any taxes on them. Indeed, a deficiency has been assessed against her for that reason. See — F. 2d at — n. 2. However, neither in *Borax* nor this case is there any evidence that the various wives' decisions about declaring the alimony as income were made in reliance on the New York decisions declaring the respective divorces invalid. In any case, their reasons for acting as they did should not be controlling.

Finally, in *Borax* the action declaring the Mexican divorce invalid was contested, whereas here the corresponding action was not. But the question before

the Commissioner is whether to give any effect for tax purposes to pieces of paper that say the taxpayer is divorced from a wife with whom he no longer lives and is married to another with whom he does indeed live. One state court's decision, contested or not, that it will not give effect to the papers as far as its law of domestic relations is concerned need not estop the parties to its decision from requesting the Commissioner to give them some effect for tax purposes at least when the jurisdiction that issued the papers has not declared them to be invalid and without effect.

For the reasons stated in *Borax,* which we find controlling, we conclude that Harold properly deducted the alimony payments to May and Virginia which were provided for in the written separation agreements. He also properly filed a joint return with Joyce and properly took a dependency deduction for her.

However, as to the deduction of $15 a week paid to May under the 1949 oral agreement, we agree with the Commissioner that it should not be allowed. From all that appears, these payments were voluntary and pursuant to no written agreement; no provision of the Code allows their deduction. Cf. *Smith* v. *Commissioner,* 168 F. 2d 446 (2d Cir. 1949); *Daine* v. *Commissioner,* 148 F. 2d 149 (2d Cir. 1948). *But* cf. *Fixler* v. *Commissioner,* 25 T.C. 1313 (1956). Compare *Newton* v. *Pedrick,* 212 F. 2d 357 (2d Cir. 1954); *Hollander* v. *Commissioner,* 248 F. 2d 523 (9th Cir. 1957). Were there a separation agreement executed in writing after 1954, the result might be different, see Int. Rev. Code of 1954 §§ 71(a)(2), 215; *Mavity* v. *Commissioner,* 341 F. 2d 865 (2d Cir. 1965).

Reversed, except as indicated with respect to the $15 a week to May.

JUDGMENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of August one thousand nine hundred and sixty-five.

Present: Hon. LEONARD P. MOORE, Hon. J. JOSEPH SMITH, Hon. PAUL R. HAYS, *Circuit Judges.*

HAROLD E. WONDSEL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeals from the Tax Court of the United States

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said the Tax Court of the United States be and it hereby is reversed in part and affirmed in part in accordance with the opinion of this court.

A. DANIEL FUSARO, *Clerk.*
By VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX C

Internal Revenue Code of 1954:

SEC. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.[13]

(a) *General Rule.*

(1) *Decree of divorce or separate maintenance.*—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) *Written separation agreement.*—If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in

[13] 1939 Code § 22(k) is substantially the same as 1954 Code § 71(a)(1). There is no provision in the 1939 Code comparable to 1954 Code § 71(a)(2).

trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

* * * * *

[26 U.S.C. 71.]

SEC. 152. DEPENDENT DEFINED[14] [as amended by SEC. 4(a) of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, 1607, retroactive to enactment of the 1954 Code].

(a) *General Definition.*—For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) as received from the taxpayer):

(1) A son or daughter of the taxpayer, or a descendent of either,

(2) A stepson or stepdaughter of the taxpayer,

(3) A brother, sister, stepbrother, or stepsister of the taxpayer,

(4) The father or mother of the taxpayer, or an ancestor of either,

(5) A stepfather or stepmother of the taxpayer,

(6) A son or daughter of a brother or sister of the taxpayer,

(7) A brother or sister of the father or mother of the taxpayer,

(8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer,

[14] 1939 Code § 25(b) is substantially the same as the quoted portions of 1954 Code § 152, except that there is no 1939 Code provision comparable to present § 152 (a)(9), (a)(10), or (b)(5).

(9) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 153, of the taxpayer) who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household, or

(10) An individual who—

(A) is a descendant of a brother or sister of the father or mother of the taxpayer,

(B) for the taxable year of the taxpayer receives institutional care required by reason of a physical or mental disability, and

(C) before receiving such institutional care, was a member of the same household as the taxpayer.

(b) *Rules Relating To General Definition.*—For purposes of this section—

* * * * *

(5) An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law.

* * * * *

[26 U.S.C. 152.]

SEC. 215. ALIMONY, ETC., PAYMENTS.[15]

(a) *General Rule.*—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable

[15] 1959 Code § 23(u) is substantially the same as 1954 Code § 215.

year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

* * * * *

[26 U.S.C. 215.]

SEC. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.[16]

(a) *Joint Returns.*—A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions, except as provided below:

* * * * *

(d) *Definitions.*—For purposes of this section—

(1) the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined—

(A) if both have the same taxable year—as of the close of such year; and

(B) if one dies before the close of the taxable year of the other—as of the time of such death; and

(2) an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married; and

(3) if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

[26 U.S.C. 6013.]

[16] 1939 Code § 51(b) is substantially the same as 1954 Code § 6013.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF HERMAN BORAX, Deceased,
HERMINE H. BORAX, ET AL., Executors,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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